Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

CHARLES S. SHAW,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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44 pp

QUESTIONS PRESENTED

1. Whether the prosecution, by failing to establish clear and convincing evidence of a *quid pro quo*, failed to establish the essential element required to sustain a conviction for violation of ***18 U.S.C. § 1951,*** *i.e.,* the "Hobbs Act"?

2. Whether Petitioner Shaw was denied his Sixth Amendment right to a fair trial, *i.e.,* the right to present a defense, by the district court's refusal to allow, among other things, an inquiry into the effect of jury tampering, adequate cross-examination of a key prosecution witness, and surrebuttal testimony as to a significant date?

3. Whether Petitioner Shaw was irreparably prejudiced by the prosecutor's comments constituting an improper vouching for the credibility of her witness?

4. Whether Petitioner Shaw suffered compelling prejudice by consolidation of the charges against him into a superseding multi-count, multi-defendant indictment encompassing activities in which Shaw had no connection?

LIST OF PARTIES

The parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit were the petitioner Charles S. Shaw, his codefendants Lambert C. Mims, Ellis L. McDonald, and Francis A. Wilkie, Jr., and the respondent, United States of America. This petition is filed solely on the behalf of petitioner Charles S. Shaw and seeks review by this Honorable Court as to his conviction alone. The interests of petitioner's codefendants, however, may be affected by this review. It should be further noted that the codefendant Ellis L. McDonald has already petitioned this Honorable Court for review of his conviction as well.

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PETITION FOR WRIT OF CERTIORARI

Charles S. Shaw respectfully petitions this Honorable Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered on December 15, 1993, wherein that Court upheld the conviction of this petitioner for a violation of the Hobbs Act ***(18 U.S.C. § 1951)*** and conspiracy to violate the Hobbs Act.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is unpublished, and thus will not be reported. This opinion is reprinted as Appendix A, *infra,* App. 1- 4.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was rendered on December 15, 1993. Thereafter, pursuant to *Rule 40, Federal Rules of Appellate Procedure,* and *Rule 40-2, Eleventh Circuit Rules,* this petitioner filed a timely petition for rehearing which was denied without opinion on February 11, 1994. Pursuant to *Rule 13.4, Supreme Court Rules,* this petition is filed within ninety (90) days of the Court's denial of rehearing. The jurisdiction of this Honorable Court to review the judgment of the United States Court of Appeals for the Eleventh Circuit is invoked under ***28 U.S.C. § 1254(1).***

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1951 provides, in pertinent part, as follows:

> "(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or

purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

"(b) As used in this section—

"....

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

RULES OF COURT INVOLVED

Rule 8, Federal Rules of Criminal Procedure, provides, in pertinent part, as follows:

"Rule 8. Joinder of Offenses and of Defendants

"....

"(b) **Joinder of Defendants.** Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count."

STATEMENT OF THE CASE

Petitioner Charles S. Shaw was initially indicted in December 1988 for conspiracy to violate the Hobbs Act and violation of the Hobbs Act.[1] This indictment was super-

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[1]Petitioner Shaw was named in two of the three counts of the indictment. Other individuals charged in this indictment were Lambert C. Mims and Ellis L. McDonald.

seded by another more comprehensive indictment in June 1989, encompassing numerous unrelated charges of violations of federal law against additional individuals, but no additional charges against this Petitioner. The superseding indictment contained thirty-six counts (thirty-five numbered counts and a forfeiture count). In addition to the defendants[2] who were parties to the proceedings in the Eleventh Circuit Court of Appeals, the indictment charged three other persons who subsequently became government witnesses or otherwise were not involved in the appeal of this case to the Eleventh Circuit.

Count One of the indictment charged Ellis L. McDonald, Lambert C. Mims, and F. Lee Jackson with conducting the affairs of an enterprise through a pattern of racketeering activity, a violation of the RICO Act, as set out in ***18 U.S.C. § 1962(c)***. The enterprise designated in this count was Campbell Construction Engineers, Inc. (CCEI), a legitimate business entity owned by McDonald which engaged in various forms of contracting work. Five predicate acts of racketeering were alleged in Count One. These acts corresponded to five substantive offenses charged elsewhere in the indictment. Although not charged in Count One of the indictment, Petitioner Shaw was named as an alleged participant in one of the predicate acts, *i.e.*, racketeering act number five.

Counts Two, Three, and Four alleged violations of the Hobbs Act, as set out in ***18 U.S.C. § 1951***. The Hobbs Act violations involved charges of extortion under color of official right, arising from the proposed construction of a steam plant facility which would generate energy by burning solid waste. The solid waste needed to fuel the steam plant was to be obtained from the City of Mobile and Mobile County public sanitation authorities. Count Two charged McDonald, Mims, and Petitioner Shaw with conspiracy to violate the Hobbs Act. Count Three again named

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[2]Petitioner Charles S. Shaw, Lambert C. Mims, Ellis L. McDonald, and Francis A. Wilkie, Jr.

McDonald, Mims, and Petitioner Shaw, but charged them with a substantive violation of the Hobbs Act by means of extortion. Count Four charged McDonald and Mims with a separate Hobbs Act violation, also involving extortion.

Counts Five through Twenty-one involved fraud against Scott Paper Company by way of inflated billings sent through the United States mails. Count Five charged McDonald, Jackson, and Michael Taylor with conspiracy to defraud Scott Paper Company through use of the mails, in violation of ***18 U.S.C. § 371***. Count Six charged McDonald, Jackson, Taylor, and William E. Cullum with substantive mail fraud, a violation of ***18 U.S.C. § 1341***. Counts Seven through Twenty-one charged Jackson and Taylor with fifteen additional acts of mail fraud, again in violation of ***18 U.S.C. § 1341***.

Counts Twenty-two through Twenty-six involved allegations of fraud against the Mobile Water Service System through use of the mails by means of bid-rigging and kickbacks. Count Twenty-two charged McDonald, Jackson, and Francis A. Wilkie, Jr. with conspiracy to defraud, a violation of ***18 U.S.C. § 371***. Counts Twenty-three through Twenty-six charged McDonald, Jackson, and Wilkie with four acts of mail fraud, violations of ***18 U.S.C. § 1341***.

Count Twenty-seven charged McDonald with obstruction of justice in attempting to induce Cullum to give false testimony in Cullum's forthcoming trial for criminal tax charges, in violation of ***18 U.S.C. § 1503***. Count Twenty-eight charged McDonald with conspiracy to defraud by impeding, impairing or otherwise obstructing the Internal Revenue Service in the ascertainment, computation, assessment, and collection of income taxes, a violation of ***18 U.S.C. § 371***. Counts Twenty-nine and Thirty-one charged McDonald with filing false tax returns, violations of ***26 U.S.C. § 7206***. Counts Thirty and Thirty-two through Thirty-five charged McDonald with tax evasion, in violation of ***26 U.S.C. § 7201***. Count Thirty-six (unnumbered in the indictment) was a forfeiture count against McDonald.

The only commonality between the "steam plant" counts (Counts Two through Four) and all remaining counts in the indictment was the involvement of CCEI, Ellis McDonald's company. The object of Counts Two through Four was for CCEI to be legitimately awarded the contract to construct the steam plant. The remaining counts involved the illegal activities of CCEI and/or its owner Ellis L. McDonald.

Petitioner Shaw moved, at various times throughout the pre-trial and trial proceedings, to sever the steam plant counts from the remainder of the indictment. These motions were denied by the district court.

The evidence adduced at trial established that in the fall of 1983, the City of Mobile solicited proposals for the development of a steam plant that would be fueled by garbage collected in the greater Mobile, Alabama area.[2] Thereafter, the City Commission received proposals from firms vying to equip, construct, and/or finance the facility. The City hired an engineering firm to review and select the most viable contenders. November 7, 1983, was established as the date for submission of all proposals. Petitioner Shaw, a long-time friend of Lambert Mims, and his partner Reitzammer submitted a proposal for the steam plant project through their company Alabama Energy Recovery (AER).

Gerald Godwin, the prosecution's chief witness, was also interested in the steam plant project. He persuaded the two owners of TBS, Inc. to allow him to invest in the company. Following his investment in TBS, Inc., Godwin arranged an introduction to Lambert Mims, then Mayor of Mobile. After it became obvious that TBS, Inc. would not be able to put together a viable steam plant proposal, TBS, Inc. allowed another company to take over its portion of the project. TBS, Inc. was dissolved in January 1983.

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[2]The high price of oil was behind the proposed construction of a garbage-powered steam plant.

Gerald Godwin, however, remained interested in the steam plant project. Approximately one week before the November 7, 1983 deadline, Godwin formed Area Services Incorporated (ASI), a shell corporation. The purpose of this corporation was to allow Godwin to vie for the right to construct the steam plant.

The engineering firm retained by the City of Mobile to review the proposals determined that Petitioner Shaw and Reitzammer's proposal, through AER, was best for the City. Gerald Godwin's proposal was rated second best.

Previously, both Godwin and Shaw had separately indicated that they intended for Ellis McDonald's company to build the steam plant. Thinking that the steam plant project would have the best chance of success if Godwin and Shaw combined their efforts, McDonald requested that Shaw and Godwin meet with him on December 8, 1983. Neither Shaw nor Godwin knew the other until McDonald introduced them at this meeting. At the meeting, McDonald told Shaw and Godwin that neither of them had anything without the other one. According to Godwin, McDonald told them that they could own the steam plant but that he was going to build the plant if it was built. McDonald did not mention political influence or pressure Godwin to come to terms with Shaw.

Godwin and Shaw then met in an attempt to work out some sort of agreement between them. Godwin attempted to convince Shaw that his proposal was not viable. According to Godwin, Shaw told him that if a steam plant was going to be built, Shaw would own one-half of it. Ultimately, Shaw, Godwin, and Reitzammer agreed to combine their efforts and jointly pursue the steam plant proposal. During these negotiations, Petitioner Shaw did not mention Lambert Mims or political influence to Godwin.[4]

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[4]Similarly, neither Mims nor McDonald ever mentioned Shaw's name to Godwin.

As a result of the agreement, Shaw allowed his company (AER) to become inactive and Godwin transferred a portion of his ASI stock to Shaw and his partner. Because of the sharp drop in the price of oil, the steam plant was never built and the entire project was scrapped.

The steam plant portion of the trial covered approximately one week. The remainder of the ten-week trial was devoted to the charges related to the Scott Paper Company and Mobile Water Service System predicate acts, *i.e.*, mail fraud, or to charges levelled against Ellis McDonald for obstruction of justice and various violations of the tax code.

Petitioner Shaw was convicted of Counts Two and Three, *i.e.*, conspiracy to violate the Hobbs Act and violation of the Hobbs Act; in June 1990, Shaw was sentenced to a term of imprisonment for ten (10) years on each count, with the sentences to run concurrently. Shaw raised numerous issues as grounds for his appeal, including all of the issues raised herein. On December 15, 1993, the Eleventh Circuit summarily affirmed Shaw's conviction, without addressing any of the numerous issues raised on appeal, and on February 11, 1994, denied Shaw's petition for rehearing without opinion. Shaw voluntarily surrendered to authorities at Maxwell Federal Prison Camp to begin serving his term of imprisonment on January 18, 1994.

REASONS FOR GRANTING THE WRIT

I. THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT AND WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL, INCLUDING ITS OWN PRIOR AND SUBSEQUENT DECISIONS, ON THE EVIDENCE NECESSARY TO SUSTAIN A CONVICTION FOR VIOLATION OF 18 U.S.C. § 1951, *I.E.*, THE "HOBBS ACT."

The decision reached in this case by a panel of the Eleventh Circuit criminalizes, by silence, conduct that is neither common law bribery nor extortion under ***18 U.S.C. § 1951.*** The net effect of the Eleventh Circuit's summary affirmance is such as to create conflict between the Eleventh Circuit and the decisions of this Honorable Court in ***McCormick v. United States, 500 U.S. ___, 111 S.Ct. 1807, 114 L.Ed.2d 307 (1991)*** and ***Evans v. United States, 504 U.S. ___, 112 S.Ct. 1881, 119 L.Ed.2d 57 (1992).*** While this Court in ***Evans*** held that the word "induced" does not necessarily indicate that the transaction must be initiated by the public official, the opinion clearly requires that "something beyond the mere acceptance of property from another is required or else the word 'induced' would be superfluous." More pointedly, the Eleventh Circuit's Opinion, based on the law and facts *sub judice,* cannot be squared with other decisions of the Eleventh Circuit because it ignores the central inquiry: whether the public official, in this case Mayor Mims, by the use of his office, willfully caused or induced or attempted to cause or induce Godwin to give him money or some other thing of value. ***See, e.g., United States v. Davis, 967 F.2d 516 (11th Cir. 1992).***

"To prove a violation of the Hobbs Act ... it is essential that the payment in question be contingent upon a mutual understanding that the motivation for the payment is the payer's desire to avoid a specific threatened harm or to obtain a promised benefit that the defendant has the inherent power to deliver either through the use of force or through the use of public office. In this sense, the crime does require a *quid pro quo.*" ***McCormick v. United States, supra, 114 L.Ed.2d at 332.***

"For a public official to commit extortion under color of official right, his course of dealings must establish a real understanding that failure to make a payment will result in the victimization of the prospective payer [in this case Godwin] or the withholding of more favorable treatment, a victimization or withholding accomplished by taking or

refraining from taking official action, all in breach of the official's trust." ***Evans v. United States, supra, 119 L.Ed.2d at 76; see also Lindgren, The Elusive Distinction Between Bribery and Extortion: From the Common Law to the Hobbs Act, 35 UCLA L.Rev. 815, 887-88 (1988).***

As previously stated, not only does the Eleventh Circuit's decision in this case conflict with prior decisions of this Court, it also conflicts with both prior and subsequent decisions rendered by the Eleventh Circuit. For example, in ***United States v. Davis, supra, 967 F.2d at 521,*** the Eleventh Circuit focused the issue as follows: "It is in final analysis, the willful use of the power of the public office itself to procure the money — to procure the payment of money not owed to the public official or his office that constitutes the offense."

The decision by the Eleventh Circuit in this case is rendered more incomprehensible in light of its decision in ***United States v. Martinez, 14 F.3d 543 (11th Cir. 1994),*** wherein the Court found that the district court had also erred to reversal in failing to adequately distinguish between legal and illegal conduct for public officials. The Eleventh Circuit's decision was reached following an examination of the United States Supreme Court decisions in ***McCormick*** and ***Evans***. The Eleventh Circuit concluded that these decisions required that the government prove the existence of an explicit promise (a *quid pro quo*) in order to obtain a conviction under the Hobbs Act. The Court stated, in pertinent part:

> We construe this language from *Evans* as adopting the *quid pro quo* requirement of *McCormick*, and conclude that the district court's failure to give an instruction embodying that requirement constitutes reversible error in this case. The district court refused to instruct the jury on the *quid pro quo* requirement under *McCormick*, because it believed that requirement was limited to

> instances of extortion under color of official right involving campaign contributions. Because *Evans* modified this standard for non-campaign contribution cases in requiring the government to prove "that a public official has obtained a payment to which he is not entitled, knowing the payment was made in return for official acts," the district court's failure to instruct the jury accordingly, was error. *Evans*, ___ *U.S. at* ___, *112 S. Ct. at 1889, 119 L.Ed.2d at 72.*

United States v. Martinez, supra, 14 F.3d at 553.

Admittedly, this case differs somewhat from ***Martinez***, due primarily to the fact that neither ***McCormick*** nor ***Evans*** had been decided by the Supreme Court at the time of Petitioner Shaw's trial and conviction in 1990. For this reason, Shaw's challenge to the proof required to sustain a Hobbs Act conviction came *via* a challenge to the sufficiency of the Government's evidence rather than an erroneous jury instruction due to the district court's failure to fully incorporate the holdings of ***McCormick*** and ***Evans*** into its oral charge to the jury. Indeed, Appellant Shaw's original appellate brief cites only the ***McCormick*** decision because it was filed with the Eleventh Circuit in April 1992, prior to the May 1992 decision in ***Evans***; thus, he did not even have the additional guidance supplied by this Court in ***Evans***. Nevertheless, the fact remains that the district court's instructions to the jury in this case failed to advise the jury that any type of *quid pro quo* was required before one could find a defendant guilty of violating the Hobbs Act.

It is undisputed that the Eleventh Circuit's Opinion in this case is in clear conflict with the Supreme Court decisions in ***McCormick*** and ***Evans***, as well as the recently released ***Martinez*** decision and a number of similar holdings by the Eleventh Circuit. Quite simply, the decision in this case criminalizes, by silence, conduct that is neither common law bribery nor extortion under ***18 U.S.C. § 1951***,

and thereby presents the opportunity for this Court to address the concerns voiced in ***Evans*** through the dissent by the Chief Justice and Justices Thomas and Scalia. Moreover, there was a complete absence of proof by the United States showing a course of dealings between Mims, Shaw, and Godwin that would establish an understanding that Godwin's failure to transfer stock in ASI to Shaw would result in ASI not receiving commitments from the City of Mobile necessary to make the construction and operation of a steam plant a viable business opportunity.

The Eleventh Circuit has previously found that "... in the final analysis, the Hobbs Act requires the willful use of the power of public office itself to procure the money, i.e. to procure the payment of money not owed to the public official or his office that constitutes the offense." ***United States v. Davis, supra, 967 F.2d at 521***. Specifically, it is the failure of the Government to prove a course of dealings which would support a real understanding that Godwin's failure to convey stock ownership in the corporation to Shaw would result in city government withholding the waste stream necessary to run the steam plant. In short, the Government must show that the power of public office was misused in such a way as to induce the giving of a benefit by Godwin to Shaw. ***Cf. United States v. Dozier, 672 F.2d 531, 537 (5th Cir.), cert. denied, 459 U.S. 943 (1982); United States v. O'Grady, 742 F.2d 682, 689 (2d Cir. 1984)***. There was no substantial evidence produced in the entire trial to show that Mims, the elected official, ever said or did anything, directly or indirectly, to see that Charles Shaw obtained any business interest or right from Godwin. Construing the facts most favorable to the Government, the evidence shows that Shaw was a close friend of Mayor Mims and Commissioner Greenough and that Shaw had received insurance business and right-of-way appraisal work from the City of Mobile. However, there is no evidence that Shaw, McDonald, or Mims ever told the alleged victim Godwin, either directly or indirectly, that he must give a portion of his interest in ASI to

Charles Shaw or he [Godwin and his company] would not have an opportunity to operate the steam plant.

Ultimately, the evidence demonstrates that the Appellant Mims, as Mayor of Mobile, officially committed himself to recommend to the other City Commissioners that the opportunity to build and run the steam plant should be given to a company known as Consumat, based on a proposal that Consumat made to the City of Mobile. The evidence is without dispute that the Government's key witness Godwin had an interest in Consumat; Shaw did not.

Finally, the Eleventh Circuit's decision *sub silentio* approved the use of the Hobbs Act to criminalize business and political relationships without requiring the Government to prove that the public official [here, Lambert Mims] obtained property from Godwin in exchange for the nonperformance or performance of his official duty, a requirement that both this Court and the Eleventh Circuit affirmatively established as a requisite element of a Hobbs Act violation in ***Evans, McCormick, United States v. Adair, 951 F.2d 316, 318 (11th Cir. 1992***), and ***Martinez***. Clearly, the mandate of the Supreme Court in ***McCormick*** and ***Evans***, the Eleventh Circuit in ***Davis, Adair,*** and ***Martinez***, and other Circuits in various decisions, require proof beyond the mere acceptance of property by a competitor and non-political office holder in order to establish a violation of the Hobbs Act. Thus, certiorari should be granted in this case to resolve the apparent conflict between the holding in this case and clearly established precedent of this Honorable Court as well as other United States Circuit Courts of Appeals.

II. THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT AND WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL, INCLUDING

ITS OWN DECISIONS, ON WHETHER PETITIONER SHAW WAS DENIED HIS SIXTH AMENDMENT RIGHT TO A FAIR TRIAL, I.E., HIS RIGHT TO PRESENT A DEFENSE.

As a result of the opinion in this case, the Eleventh Circuit has overruled *sub silentio* established law of the Eleventh Circuit as well as having failed to follow the controlling case law of the United States Supreme Court on a fundamental constitutional right, *i.e.*, the right to present a defense.

A. REFUSAL TO ALLOW AN INQUIRY INTO THE EFFECT OF JURY TAMPERING.

Implicit in the fundamental right of a trial by jury is the fact that the jury will not be influenced by bias or extrinsic evidence. Indeed, this Honorable Court has made it clear that "any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is ... presumptively prejudicial...." ***Remmer v. United States, 347 U.S. 227, 229, 74 S.Ct. 450, 451, 98 L.Ed. 654 (1954)***. "The government bears a heavy burden of proving that any off-the-record contact with a juror did not affect the jury, and if such burden is not met, a new trial is required." ***United States v. Spurlock, 811 F.2d 1461, 1463 (11th Cir. 1987) (citing United States v. Phillips, 664 F.2d 971 (5th Cir. Unit B 1981)); see also United States v. Perkins, 748 F.2d 1519, 1533 (11th Cir. 1984).***

In ***United States v. Harris, 908 F.2d 728, 733 (11th Cir. 1990), cert. denied, 498 U.S. 1093 (1991)***, the Eleventh Circuit emphasized that

> Juror misconduct concerning outside influences must be fully investigated to determine if any misconduct actually occurred and whether or not it was prejudicial. *United States v. Brantley, 733 F.2d 1429, 1439 (11th Cir. 1984), cert. denied, 470*

> *U.S. 1006, 105 S.Ct. 1362, 84 L.Ed.2d 383 (1985).* Failure to hold a hearing in these cases constitutes an abuse of discretion and is thus reversible error. *United States v. Chiantese, 582 F.2d 974, 979 (5th Cir. 1978), cert. denied, 441 U.S. 922, 99 S.Ct. 2030, 60 L.Ed.2d 395 (1979).*

Moreover, "[a] party claiming that an improperly influenced jury returned a verdict against him must be given an opportunity to prove his claim." ***United States v. Brantley, 733 F.2d 1429, 1439 (11th Cir. 1984) (quoting United States v. Forrest, 620 F.2d 446, 457 (5th Cir. 1980)).*** All that is required is that the party first make a "colorable showing" that extrinsic matters have been considered by the jury. ***Remmer, supra, 347 U.S. at 229; United States v. Ayarza-Garcia, 819 F.2d 1043, 1051 (11th Cir.), cert. denied, 484 U.S. 969 (1987).***

In ***United States v. Forrest, 620 F.2d 446, 457 (5th Cir. 1980),*** the Fifth Circuit addressed the issue of jury tampering in the following terms:

> Where there has been an attempt at jury tampering, the court must guard against tampering, the court must guard against the possibility that the jury will assume one of the parties was responsible for the attempt and, based on that assumption, decide the merits of the case unfavorably to that party. *Stimack v. Texas, 548 F.2d 588 (5th Cir. 1977). Cf. United States v. Herring, 568 F.2d 1099 (5th Cir. 1978)* (conviction reversed because jury had been exposed to newspaper report that life of government witness had been threatened). The court also must guard against the possibility that the tampered-with juror will comment on the merits of the case in the presence of other jurors. *United States v. Ferguson, 486 F.2d 968 (6th Cir. 1973).*

The Eleventh Circuit's decision in this case is even more incomprehensible, in light of its subsequent decision

in ***United States v. Martinez,*** which reiterated the long-standing rule that a defendant does not have the burden of proving prejudice as a result of outside influence upon members of the jury with these words:

> As a matter of established law, the burden of proving prejudice does not lie with the defendant because prejudice is presumed the moment the defendant establishes that "extrinsic contact with the jury in fact occurred." The lineage of this rule runs deep in Supreme Court jurisprudence: "Private communications, possibly prejudicial, between jurors and third persons ... are absolutely forbidden and invalidate the verdict at least unless their harmlessness is made to appear." More recently, the Court reaffirmed this rule with emphatic clarity:
>
> > "In a criminal case, *any private communication [or] contact* ... directly or indirectly, with the juror during a trial about the matter pending before the jury *is, for obvious reasons, deemed presumptively [...] prejudicial,* if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties."
>
> Once the defendant proves extrinsic contact, the burden shifts to the government to demonstrate that the consideration of the evidence was harmless. Again, as the Court unambiguously held: "The presumption [of prejudice] is not conclusive, but the burden rests heavily upon the government to establish, after notice to the defendant, that such contact with the juror was harmless to the defendant."

United States v. Martinez, supra, 14 F.3d at 550 *(citations omitted).*

In ***Martinez***, the Eleventh Circuit determined that, even after an investigation into possible extrinsic contact by the district court, the Government failed to meet its burden of proving that extrinsic matters had not affected the jurors. The facts in this case are even more egregious than those in ***Martinez***. Here, it is clear that an initial incident of jury tampering occurred midway through trial. Two jurors were examined by the trial court, subsequently excused, then replaced by alternate jurors. The two excused jurors were admonished not to have any further contact with the remaining jurors. Thereafter, the remaining jurors were individually questioned by the court *in camera* as to their knowledge concerning the jury tampering incident. All denied any knowledge of the incident. However, one juror informed the court that she had heard one of the excused jurors commenting that "... if he [Mims] didn't have something to hide, he would have revealed it [Mims' desk calendars]." Despite the implicit prejudice evidenced by such a comment, the juror was allowed to continue serving. Near the trial's conclusion the court once again brought the jurors in *ex parte* for individual questioning outside the presence of counsel and the defendant. Each was asked whether there had been any outside contact. Again, each of the jurors denied having received any outside contact. One juror did, in response to the question of whether she had knowledge of any other juror being contacted, commented rather vaguely that "... no, they hadn't mentioned it to me." The circumstances of the illegal contact with the two jurors were never fully investigated, nor were the remaining jurors questioned in such a way as to meaningfully establish the absence of additional outside influence and/or other improper contact. Unbelievably, the Government was never required to demonstrate that the extrinsic contact was harmless. Moreover, the defendants were never given the opportunity to present evidence of this improper contact to the court.

In addition, the district court did not provide defense counsel with either a transcript or summary of the court's

in camera examinations of the remaining jurors. Indeed, as was repeatedly pointed out to the Eleventh Circuit, defense counsel had no knowledge of what was said between the court and jurors in chambers until receipt of the appellate transcript several months after the fact. After the jury returned a verdict, an investigator employed by counsel for another defendant learned that one of the jurors excused in the jury tampering incident had made an improper contact with a sitting member of the jury in violation of the court's order. This information was provided to the court in the form of a sworn affidavit and was the basis for counsel's request for permission to interview the jurors in order to ascertain the effect jury tampering had on the remaining jurors. Counsel's request was summarily denied; thus no further investigation of this matter could proceed.

Given the existence of a prior documented jury tampering attempt, the district court's refusal to allow inquiry into the possibility of additional jury tampering flies in the face of established Eleventh Circuit case law, the most recent example being ***Martinez***:

> Although we assume that jurors follow the trial court's instructions, in instances such as this, where jurors demonstrate a willingness to disregard the court's instructions, we are justifiably skeptical of the jurors' ability to follow instructions in the future. *See United States v. Heller, 785 F.2d 1524, 1526-28 (11th Cir. 1986)* (reversal of defendant's tax conviction warranted where juror questioned unknown accountant and shared conversation with other jurors, despite jurors' individual promises that they could disregard extraneous matters).

United States v. Martinez, supra, 14 F.3d at 551.

The fact that the excused juror had previously commented to the court that he "expected something like this

to happen" due to the prominence of various defendants casts great doubt as to the exact nature of his contact with the unidentified female juror after he had been excused and specifically admonished not to have further contact with the remaining jurors. Moreover, the contact casts doubt on the ability of the juror to follow the district court's instructions, in light of the fact that all of the sitting jurors had been admonished to avoid any type of contact with anyone concerning the case. It is impossible for this Court to determine the extent of the possible prejudice. More importantly, the district court's refusal to permit all defendants the opportunity to hold a hearing effectively cut off Shaw's Sixth Amendment right to a fair trial by an untainted jury. The district court's refusal to investigate or to even allow counsel, under the guise of Local Rule 12, the opportunity to interview jurors in an attempt to present evidence of further tampering requires reversal under previous decisions of this Honorable Court as well as the various United States Circuit Courts of Appeal.

B. RESTRICTED CROSS-EXAMINATION OF A KEY PROSECUTION WITNESS.

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the [prosecution's] accusations." ***Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 1045, 35 L.Ed.2d 297 (1973)***. However, the net effect of the Eleventh Circuit's Opinion is to *sub silentio* overrule established law of that Circuit and to disregard controlling precedent of the Supreme Court as to the extent of cross-examination mandated by the Sixth Amendment's Confrontation Clause.

In ***Delaware v. Van Arsdall, 475 U.S. 673, 678-79, 106 S.Ct. 1431, 89 L.Ed.2d 674, 682-83 (1986)***, the Supreme Court held that the Sixth Amendment's Confrontation Clause guarantees the right to a sifting cross-examination which would disrobe and/or uncover the

motivations of adverse witnesses. ***See also Davis v. Alaska, 415 U.S. 308, 316-17, 94 S.Ct. 1105, 1110-11, 39 L.Ed.2d 347 (1974).***

Similarly, the Eleventh Circuit "has long recognized the particular importance of searching cross-examination of witnesses who have substantial incentive to cooperate with the prosecution." ***Jenkins v. Wainwright, 763 F.2d 1390, 1392 (11th Cir. 1985), cert. denied, 476 U.S. 1164 (1986).*** Moreover, as that court stated in ***United States v. Lankford, 955 F.2d 1545 (11th Cir. 1992):***

> [W]here the witness sought to be cross-examined is the government's "star" witness, providing an essential link in the prosecution's case, the importance of full cross-examination to disclose possible bias is necessarily increased.... Unless the defendant has been permitted sufficient cross-examination to allow a jury to adequately assess the witness' credibility, the district court's limitation of cross-examination will be in error.

955 F.2d at 1548 (citations omitted). The opinion rendered by the Eleventh Circuit in this case simply cannot be reconciled with the decision in ***Lankford***, a case virtually "on all fours" with this case. In ***Lankford***, the Court determined that the trial court's refusal to allow cross-examination into the possible motive of the key prosecution witness for testifying, *i.e.*, the arrest of his sons on drug charges, constituted reversible error in a Hobbs Act prosecution.

Here, Godwin testified during the prosecution's case in chief that it was his understanding that if he did not transfer a portion of his stock in ASI to Shaw then ASI would not be awarded the contract for the city garbage necessary to fuel the proposed steam plant. Godwin's testimony and credibility were critical to the prosecution's case. Godwin and Shaw were the only two present at the meeting where he was allegedly extorted. During cross-examination, Godwin was impeached on several key issues,

including his alleged financial investment in the corporation as well as his alleged failure to receive any benefits from the corporation. During rebuttal, Godwin was recalled as a witness in an attempt to rehabilitate his credibility. However, the district court refused to allow Shaw's counsel during cross-examination to impeach Godwin by proof that he had perjured himself during his previous testimony as to the critical meeting. The district court's refusal to allow Shaw the right of full and fair opportunity to cross-examine Godwin as to his motives for testifying requires reversal under the established law of this Court.

C. REFUSAL TO ALLOW SURREBUTTAL AS TO A SIGNIFICANT DATE.

The Eleventh Circuit's Opinion also fails to address a question of exceptional importance, *i.e.*, whether the trial court's refusal to allow Shaw to present surrebuttal evidence as to a key meeting first established during rebuttal was so vital as to deny him his Sixth Amendment right to present a defense. The net result of that Court's actions is to create a conflict between the circuits as to this issue.

Admittedly, the decision to permit surrebuttal falls within the discretion of the trial court. ***United States v. Winkle, 587 F.2d 705, 712 (5th Cir.), cert. denied, 444 U.S. 827 (1979),*** and is therefore subject to harmless error analysis. ***United States v. Moody, 903 F.2d 321, 330 (5th Cir. 1990); United States v. King, 879 F.2d 137, 138 (4th Cir.), cert. denied, 493 U.S. 900 (1989).***

"Surrebuttal testimony should go to the essence of the rebuttal testimony." ***United States v. Glass, 709 F.2d 669, 674 (11th Cir. 1983).*** In ***Moody, supra, 903 F.2d at 331,*** the Fifth Circuit made it clear that under the Sixth Amendment's Confrontation Clause, a criminal defendant enjoys the right to present evidence in surrebuttal where the Government's rebuttal testimony raises a new issue which broadens the scope of the Government's case and the defense's proffered surrebuttal testimony is capable of discrediting the essence of the Government's rebuttal testimony.

The Court, in ***Moody***, held that the rebuttal testimony both significantly reinforced the Government's fraud theory, but also expanded the Government's case into new areas, and that Moody was therefore entitled to present surrebuttal testimony as to this issue. Ultimately, the court concluded in ***Moody***, that refusal of the trial court to allow surrebuttal constituted a breach of the Sixth Amendment's right of confrontation required reversal. ***903 F.2d at 331.***

During the Government's rebuttal in this case, Coffield testified that Mims sent him to see Shaw on October 27, 1983, and that he met with Shaw at 1:30 p.m. that day. During this meeting Shaw allegedly informed Coffield that he [Shaw] had a contract with the City of Mobile for its garbage and a contract with Stone Container for the consumption of steam-generated power. This was the first mention of any agreement between Mims and Shaw occurring prior to the date that requests for proposals were due to be received, and became the basis for the prosecution's argument that a secret agreement existed between the two men that Shaw would receive the City's commitment for the steam plant. Additionally, the October 27, 1983 date had never before been mentioned in the indictment, the Bill of Particulars, or during the preceding weeks of testimony.

At the close of rebuttal, Shaw sought to introduce surrebuttal as to his whereabouts on this date. Specifically, Shaw sought to testify that on October 27, 1983, he was en route from Colorado to Mobile, following his attendance at a convention. Court's Exhibit 14, a travel agent's receipt dated October 19, 1983, showed the purchase of airline tickets for Mr. and Mrs. Shaw which placed them in the air between Colorado and Mobile on October 27, 1983, at the time of the alleged meeting. This critical evidence was refused. Thus, the jury had no knowledge of the fact that Coffield's subsequent testimony conflicted with other evidence as to Shaw's whereabouts on October 27, 1983. Shaw's travel itinerary on October 27, 1983, clearly was relevant impeachment which supported Shaw's assertion that this meeting did not occur until after the bids were opened.

III. THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS CONFLICTS WITH APPLICABLE DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL, INCLUDING ITS OWN DECISIONS, ON WHETHER THE PROSECUTOR'S COMMENTS CONSTITUTED IMPROPER VOUCHING FOR THE CREDIBILITY OF HER WITNESS.

With the exception of this decision, the Eleventh Circuit as well as other Circuit Courts of Appeals, have long held that it is improper for the prosecution to place the prestige of the Government behind a witness by making explicit personal assurances of the witness' veracity or by indicating that information not presented to the jury supports the testimony or the Government's theory of the case. ***See, e.g., United States v. Hernandez, 921 F.2d 1569, 1573 (11th Cir.), cert. denied, 111 S.Ct. 2271 (1991).*** Thus, the net result of the Eleventh Circuit's opinion in this case is to create a conflict between the Circuit Courts of Appeal as to this issue.

Here, the prosecutor's repeated attempts to vouch for her witness' credibility and to suggest extra-record knowledge on the part of the prosecutor implicate this concern in both ways: She implied directly that she had additional personal knowledge about the witness and facts which confirmed the witness' testimony and thereby added to the witness' testimony the influence and weight of the prosecutor's office. ***United States v. Carter, 953 F.2d 1449, 1460-61 (5th Cir.), cert. denied, 112 S.Ct. 2980 (1992).*** The Government simply cannot argue the credibility of a witness based on the Government's reputation or allude to evidence not formally before the jury. ***United States v. Eyster, 948 F.2d 1196, 1206 (11th Cir. 1991).***

In ***Eyster***, the defendant's conviction was reversed on the ground that the Government cannot argue the credibility of a witness based on the Government's reputation or

allude to evidence not formally before the jury. Moreover, in ***United States v. Carter***, the Fifth Circuit recognized that such comments are sufficient to rise to the level of "plain error." ***United States v. Carter, supra, 953 F.2d at 1460; see also United States v. Corona, 551 F.2d 1386, 1388-91 (5th Cir. 1977)*** (plain error for prosecutor to personally vouch for a witness in closing argument and also to make various references to facts outside the record). ***In United States v. Garza, 608 F.2d 659, 662 (5th Cir. 1979)***, the Fifth Circuit held that reversal was required when a prosecutor personally vouched for witnesses' credibility on several occasions and indicated that he would not have brought charges against the defendant if he had not believed the defendant to be guilty. Similarly, the Third Circuit, in ***United States v. DiLoreto, 888 F.2d 996, 999 (3rd Cir. 1989)***, established the rule that a prosecutor's remarks regarding the defendant's guilt or witness' credibility based on evidence not adduced at trial required reversal *per se*. Finally, the Ninth Circuit, in ***United States v. Smith, 962 F.2d 923, 935-36 (9th Cir. 1992)***, held that reversal was required when the prosecutor suggested that he would bring perjury charges against a key witness had the witness lied, given the paucity of remaining evidence.

In this case, the Eleventh Circuit's Opinion flatly conflicts with the established law of the Eleventh Circuit as well as numerous other Circuit Courts of Appeal. Here, the linchpin witness in the Government's Hobbs Act case against Mims and Shaw was Gerald Godwin. Without Godwin's testimony, the Government's extortion case was "dead in the water." Realizing that the key Government witness' testimony was riddled with holes, the prosecutor sought to plug the leak by vouching for her witness' credibility to the jury and by suggesting that additional evidence of the Petitioner's guilt existed *dehors* the record.

Given the central role of Gerald Godwin to the prosecution, the prosecutor's comments were direct, calculated and numerous, and they prejudicially affected the substan-

tial rights of the Defendants Shaw and Mims in the process as follows:

A. "Jerry Godwin is no liar."

B. "I would say you're looking at a pretty durn *[sic]* honest man."

C. "... Yes, during World War II and before, he attended extension courses at the University of California at Berkeley. He tells you that. He doesn't lie...."

D. "Another thing, it doesn't explain at all why Jerry Godwin would make up a story like this involving Lambert Mims and Mr. McDonald. No motive whatsoever. It's because it is the truth. This is what happened to Jerry Godwin and it's exactly like he told you from the stand."

E. "Here is a 75-year-old man who climbs up on the stand and tells the truth."

F. "He gets up there on the stand and I will submit to you, tells the truth."

It would be absolute legal sophistry to believe that the prosecutor's repeated statements of her personal belief in Godwin's veracity were either missed or lost upon the jury. It was clearly an improper attempt to bolster Godwin's credibility and requires reversal under the mandate of ***United States v. Eyster*** as well as a host of other decisions. Moreover, the prosecutor then put her own credibility on the line with the following comments during closing argument:

> ... I submit to you that politics plays no part in this case and should not be of any consideration to you. I submit it has not been of any consideration to this office, to the United States Attorneys' Office in bringing this prosecution. I was appointed by Billie *[sic]* Kimbrough, a democratic U.S. Attorney. Buzz and Ed (the prosecutor's co-coun-

> sel) were working for Chris Galanos, the democratic District Attorney. You think the District Attorney is going to commit two of his people to a project that is this time consuming if there were politics involved? If the point is to go get the democrats? That argument is patently ridiculous. Would I indict Ellis McDonald who is friends with Mr. Callahan and Mr. Edwards, the two biggest republican figures in this area, if politics were involved? I submit to you that plays no part in this case.

The clear and unmistaken import of the prosecutor's comments was an attempt to place the "good housekeeping seal of approval" on the prosecution by directly placing the integrity of the Office of the United States Attorney into the balance, thereby clearly implying that there were other extra-record reasons to bring this prosecution against those she believed were guilty. The Government's continual comment on the credibility of Godwin based on the prosecutor's opinion and repeated allusion to evidence not formally before the jury requires reversal under the established law of the Eleventh Circuit, as well as various other Circuit Courts of Appeal. For this reason, certiorari should issue to correct the manifest injustice inflicted upon Petitioner Shaw by the prosecutor's actions.

IV. THE PETITION SHOULD BE GRANTED BECAUSE THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT AND WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL, INCLUDING ITS OWN DECISIONS, ON WHETHER PETITIONER SHAW SUFFERED COMPELLING PREJUDICE DUE TO THE DISTRICT COURT'S DENIAL OF HIS MOTIONS FOR SEVERANCE.

The Eleventh Circuit's Opinion summarily concluded that there was no merit to Shaw's contention that he had been prejudiced by the initial joinder and subsequent denial of his motions to sever, despite the fact that the evidence adduced at trial connected him to only two of the thirty-six counts contained in the indictment. As a result of the opinion in this case, the Eleventh Circuit has failed to follow the controlling case law of the Supreme Court as well as having overruled *sub silentio* established law of the Eleventh Circuit.

Before a defendant is entitled to a severance, he must first show "compelling prejudice," ***Lane v. United States, 474 U.S. 438, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986); Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946),*** that is:

> Whether under all circumstances of the particular case, as a practical matter, it is within the capacity of the jurors to follow the court's admonitory instructions and accordingly to collate and appraise the independent evidence against each defendant solely upon that defendant's own acts, statements and conduct. In sum, can the jury keep separate the evidence that is relevant to each defendant and render a fair and impartial verdict as to him?

United States v. Varella, 692 F.2d 1352, 1360 (11th Cir. 1982), cert. denied, 463 U.S. 1210, cert. denied, 464 U.S. 838 (1983); see also United States v. Serpoosh, 919 F.2d 835 (2d Cir. 1990); United States v. Terry, 911 F.2d 272 (9th Cir. 1990).

More recently, this Honorable Court, in ***Zafiro v. United States, 506 U.S. ___, 113 S.Ct. 933, 122 L.Ed.2d 317, 325 (1993),*** addressed this issue, writing as follows:

> We believe that, when defendants properly have been joined under Rule 8(b), a district court

> should grant a severance under Rule 14 only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence. Such a risk might occur when evidence that the jury should not consider against a defendant and that would not be admissible if a defendant were tried alone is admitted against a codefendant. For example, evidence of a codefendant's wrongdoing in some circumstances erroneously could lead a jury to conclude that a defendant was guilty. When many defendants are tried together in a complex case and they have markedly different degrees of culpability, this risk of prejudice is heightened. *See Kotteakos v. United States, 328 U.S. 750, 774-775, 90 L.Ed. 1557, 66 S.Ct. 1239 (1946).*

See also Lane v. United States, 474 U.S. 438, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986); Schaffer v. United States, 362 U.S. 511, 80 S.Ct. 945, 40 L.Ed.2d 921 (1960).

Not only does the Eleventh Circuit's decision conflict with previous decisions of this Honorable Court, it also conflicts with previous decisions of the Eleventh Circuit, as well as other Circuit Courts of Appeals. In ***United States v. Fernandez, 892 F.2d 976, 990-91 (11th Cir. 1989),*** the Eleventh Circuit reversed a defendant's conviction where the prosecution's proof established not one but two conspiracies, only one of which involved this defendant [Del Ray], with the result that he was prejudiced by the evidence admitted against his co-defendants as proof of the other conspiracy.

> .... [O]ur major concern under all the circumstances of this case is that the admissible and inadmissible direct evidence against Fernandez and Recarey likely set the stage for the case against Del Ray, with the resulting risk too great that the jurors, "ready to believe that birds of a feather are flocked together," *Krulewitch v.*

United States, 336 U.S. 440, 454, 69 S.Ct. 716, 723, 83 L.Ed. 790 (1949) (Jackson, J., concurring), transferred guilt to Del Ray.

Similarly, in ***United States v. Castro, 829 F.2d 1038, 1046-47 (11th Cir. 1987), withdrawn in part on other grounds, 837 F.2d 441 (11th Cir. 1988)***, the Eleventh Circuit held that compelling prejudice resulted from a "spillover" of evidence when the defendant's conspiracy charge consumed only ten days of a six-month trial, evidence of the defendant's guilt was not overwhelming, and "compellingly offensive and voluminous" evidence was presented against the numerous codefendants. In ***United States v. Tootick, 952 F.2d 1078, 1082-83 (9th Cir. 1991)***, the Ninth Circuit refused to uphold a trial court's denial of severance, finding that "manifest prejudice" resulted from the prosecution arguing the logical impossibility of accepting the defendants at their words when they presented mutually exclusive defenses. Likewise, in ***United States v. Nicely, 922 F.2d 850, 858 (D.C. Cir. 1990)***, the Court of Appeals for the District of Columbia Circuit held that a misjoinder occurred when charges of conspiracy to induce a manufacturer to pay money to obtain a subcontract were joined with charges of conspiracy to launder money, thereby depriving the defendants of a fair trial.

The trial of this case was lengthy, with virtually all of the trial centering on evidence wholly unrelated to Charles Shaw or the creation of a garbage-powered steam plant. As a result, the jury heard weeks of testimony about alleged racketeering, mail fraud, conspiracy to defraud the government, obstruction of justice, tax fraud, and tax evasion, all of which had absolutely no connection to Shaw. The jury was also exposed to attempted jury tampering on behalf of another defendant resulting in dismissal of two jurors mid-trial, and to tape-recorded conversations wherein a co-defendant repeatedly used racial slurs. The cumulative effect of the evidence against McDonald unrelated to Shaw poisoned the jury to such an extent that he was deprived of a fair trial within the Sixth Amendment.

The district court attempted to rationalize Shaw's joinder by the fact that, although he was not named in the RICO count, the steam plant concept was alleged to have been one of the predicate acts in the RICO count. Any justification for Shaw's joinder factually vanished at trial. Both the evidence and verdict demonstrated no factual basis for the allegation that the steam plant was part of a larger conspiracy and neither Shaw nor Mims were convicted of participating in any criminal conduct with McDonald. Had this misjoinder not occurred, there is more than a reasonable chance that the jury might not have convicted Shaw. ***See United States v. Watson, 866 F.2d 381, 385 (11th Cir. 1989).*** Accordingly, the district court's refusal to grant a severance requires reversal under the established law of this Honorable Court as well as various Circuit Courts of Appeals.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted and this case set for plenary consideration, thereafter remanding this cause to the United States Court of Appeals for the Eleventh Circuit for the appropriate disposition.

May 9, 1994

Respectfully submitted,

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APPENDIX TO THE BRIEF OF PETITIONER CHARLES S. SHAW IN SUPPORT OF HIS PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-7436

D.C. Docket No. CR89-00105-B

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ELLIS L. McDONALD, LAMBERT C. MIMS,
CHARLES S. SHAW, FRANCIS A. WILKIE, JR.,

Defendants-Appellants.

No. 91-7145

D.C. Docket No. CR89-00105-CB

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

CHARLES S. SHAW, FRANCIS A. WILKIE, JR.,
ELLIS L. McDONALD, LAMBERT C. MIMS,

Defendants-Appellants.

No. 91-7333

D.C. Docket No. CR89-00105-CB

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LAMBERT C. MIMS,

Defendant-Appellant.

Appeals from the United States District Court
for the Southern District of Alabama

(December 15, 1993)

Before BIRCH, DUBINA and BLACK, Circuit Judges.
PER CURIAM:

I.

This is a complex criminal case involving four defendants and tweny-nine issues raised on appeal. The record demonstrates that the defendants were charged with numerous criminal violations including, among other things, racketeering, extortion, conspiracy to defraud, fraud through the use of the mails, obstruction of justice and various tax charges. The case was tried to a jury in the United States District Court for the Southern District of Alabama. The trial lasted approximately two and a half months. With the exception of defendant Shaw, who was convicted on both of the charges made against him, the remaining defendants were convicted of some charges, but acquitted of others. Each defendant appeals his conviction. Additionally, defendant McDonald appeals his sentence and the denial of his post-verdict motion.

II.

During the trial the government presented massive amounts of evidence through witnesses and documents that the defendants were involved in an extortion referred to as "the Steam Plant Extortion," fraud and bribery of the Mobile Water Service System, tax fraud, and obstruction of justice. After carefully reviewing the massive record in this case, and after reading the briefs and having the benefit of oral argument, we are persuaded that there is no merit to any of the issues the defendants present in this appeal concerning their convictions. Therefore, the convictions of each defendant are summarily affirmed.

III.

Defendant McDonald argues that, in sentencing[1] him on the four counts[2] subject to a sentencing guidelines sentence, the district court improperly added two levels to the adjusted offense level for obstruction of justice based solely on the fact that McDonald had been indicted for tampering with the jury. In its brief, the government concedes that, pursuant to previous holdings of this court, the district court is required to make findings, based upon a preponderance of the evidence, and cannot base its findings solely on the allegations contained within an indictment. *See United States v. Andrews, 953 F.2d 1312 (11th Cir. 1992); United States v. Castelanos, 904 F.2d 1490, 1495 (11th Cir. 1990).* Accordingly, we vacate McDonald's sentence and

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[1]Ellis McDonald is the only defendant to appeal his sentence.

[2]Counts One, Twenty-seven, Twenty-eight, and Thirty-five.

remand his case to the district court for resentencing on Counts One, Twenty-seven, Twenty-eight and Thirty-five.[3]

AFFIRMED in part, VACATED in part and REMANDED for resentencing.

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[3]We also observe from the record that the adjusted offense level used at sentencing was incorrectly determined, by a mistake in the addition, to be twenty-three. The base offense level was determined to be nineteen. Defendant McDonald then received a four level increase for role in the offense and a two level increase for obstruction of justice. These figures result in a total adjusted offense level of twenty-five instead of twenty-three. The district court should correct this error upon remand.